

07-04 MEE 2 Example 1

1. The ruling that there must be cause to remove a director was erroneous.

A director may be removed with or without cause by a vote of shareholders. If there is a voting trust or vote pooling agreement that was supposed to be in effect and was breached by this action, then there may be contract remedies or an injunction as an appropriate remedy, but a director may nevertheless be removed with or without cause by a valid vote of shareholders.

Therefore, this is not a basis for retaining Diane as a director. Diane may be removed for any reason or no reason - that is the primary power of the shareholders.

2. Arnie was not entitled to vote Sam's shares, the ruling was erroneous.

A shareholder has a right to vote shares if he is the owner of record as of the record date fixed by the corporation's secretary.

A shareholder may issue a proxy, which allows the proxy holder to vote the shareholder's shares for the shareholder. A valid proxy must be written, granting the right to vote the shares, and directed to the corporation's secretary. A proxy is only valid for 11 months. To be an irrevocable proxy, it must state that it is irrevocable and be supported by an interest.

This was apparently a valid proxy. It was written, signed, authorizing the proxy, within 11 months, and given to the corporate secretary. However, there was no interest coupled with the proxy. Therefore, it was not irrevocable. Sam revoked the proxy he issued to Arnie by issuing a subsequent proxy to Betty that expressly revoked the proxy to Arnie. Therefore, Arnie was not entitled to vote Sam's shares.

3. The ruling is correct - the vote was not sufficient to remove Diane from office.

A shareholder vote is valid if there is a quorum present of the shares entitled to vote. As the facts state that 240,000 shares were voted, this is an extraordinary 100% turnout of shares, therefore a quorum was present. In a corporation where cumulative voting is allowed, a director can't be removed if there are enough votes for keeping the director to elect the director at a regularly scheduled meeting.

Here, the facts indicate that 60,001 shares is enough to elect a director at a regular meeting. Therefore, since 75,000 shares voted for Diane at the special election, Diane was not removed. The purpose of cumulative voting is to allow a minority of shareholders to cumulate their vote and elect a director. It would defeat the protections that cumulative voting provides to allow any director that had just enough support under cumulative voting to be removed at a special election where a majority will always win because the only thing to vote for is whether to retain or dismiss that director.

07-04 MEE 2 Example 2

Diane would not be able to be removed in this case because the first two rulings were incorrect, but the last ruling was correct. At issue in the case is the procedure for removal of the directors of a corporation.

First, the ruling that showing cause for removal was required is incorrect. Under the Corporations Laws of Missouri, unless stated otherwise in the articles or bylaws, a director can be removed by the shareholders for any reason *or for no reason at all*. Thus, if a majority of the outstanding shares voted to remove Diane (absent other circumstances discussed below) she would be removed as a director, as no cause needs to be shown.

Second, the ruling that Arnie was entitled to vote Sam's shares is also incorrect. Under Missouri Corporations laws, assuming there is a valid proxy (which gives another person the right to vote your shares, and such proxy is valid in this case), it is freely revocable at any time unless BOTH:

1. the proxy specifically states that it is IRREVOCABLE;
- and 2. the proxy is coupled with an interest.

In this case, the proxy did specifically state that it was irrevocable. However, the second element is not met because there is nothing indicating that Arnie had an interest in the shares, such as the shares being transferred to him. Thus, because he had no interest, the proxy was freely revocable. By signing another proxy and revoking the prior proxy, Sam effectively revoked his proxy to Arnie.

Finally, the ruling that even if Betty had the right to vote Sam's shares, the resulting vote was insufficient to remove Diane is correct. Under Missouri corporations laws, although a director can be removed for any reason by a majority vote of the shares, if the director is elected by cumulative voting and the votes against removal would have been sufficient to elect the director, she cannot be removed.

In this case, 60,001 votes would be sufficient to elect a director. Diane had, at a minimum, 75,000 votes against her removal. Thus, this was a sufficient amount to elect her and she cannot be removed under this vote.

Therefore, the corporate secretary was incorrect in her first two rulings but Diane would still not be able to be removed under this vote.

07-04 MEE 2 Example 3

1.

The ruling that no valid cause was shown for removal was incorrect. In Missouri, absent a controlling provision in a corporation's bylaws, a director can be removed for any reason (with or without cause). Such removal needs only to be proposed and voted upon at a shareholder meeting called for that purpose. Here, the facts state that a shareholder meeting was properly called (notice given more than 20 days from the vote to all shareholders of record plus designation that the meeting was for the purpose of removing Diane). The facts also indicate that the bylaws do not contain any provisions regarding "for cause" only removal. Therefore, a sufficient vote at this meeting could remove Diane regardless of any cause shown.

2.

The ruling that Arnie was entitled to vote is probably incorrect, though more facts are needed. Under Missouri corporate law, a shareholder can designate another person to vote his shares at any scheduled shareholder meeting if the shareholder signs a written proxy for that purpose. The proxy is presumed revocable, but it can be made irrevocable by (i) being designated as such on the proxy, and (ii) having an interest attached to the proxy (i.e. paying for the shares).

The fact here do not indicate whether Sam's proxy to Arnie met the interest requirement. If so, then Sam cannot revoke the proxy and the vote as tallied by the secretary would be correct. However, because the facts make no reference, it is likely that no interest was transferred in exchange for the irrevocability (the fact that Sam later signed a proxy to Betty indicates he retained ownership of the shares). Without notice, the designation "irrevocable" on Arnie's proxy carries no meaning and Betty's proxy (arising later and expressly revoking Arnie's) should govern the vote for Sam's shares.

Therefore, it is likely that the secretary incorrectly allowed Arnie to vote in place of Betty, and the vote should have been tallied 165,000 to remove against 75,000 to not remove.

3.

The ruling that Diane was not removed based on the vote count including Betty's support of removal should stand. In Missouri, absent contrary provisions in the bylaws, removal of a director need only a simple majority of the shares present (so long as a quorum is present, which is at least 51% of the outstanding shares). However, Zeta, Inc.'s bylaws do state that a relevant alteration. Under the bylaws, a person who receives at least 60,001 votes can be elected as a director. Though the bylaws do not indicate a needed vote total for removal, it follows that if there are fewer than 60,001 votes to not remove a director, then removal should occur.

In this case, even counting Betty's votes instead of Arnie's results in 75,000 votes to not remove Diane. Furthermore, the corporation is required to have 9 directors. As such, the removal of

Diane would require the shareholders also elect a new director, which in theory could be Diane because she possesses the requisite number of votes. The practical effect is to create a bylaw that a removal of a director requires less than 60,001 votes against. Here there are more than enough votes to elect Diane to the vacant seat.

Therefore, the controlling election bylaw can defeat the removal action if there are more than 60,001 votes to keep Diane, which is the case here.

07-04 Substitute for MEE 3, Example 1

1. Assuming that Danny's first marriage was not properly dissolved, Cindy's request for annulment would be granted but her request for maintenance would be denied. At issue is whether Cindy and Danny were ever properly married. In order to have a valid marriage, there are many requirements, including:

1. they must both be 18 or over (or parental/court consent).
2. *they must NOT be married to anyone else.*
3. they must follow the correct procedure, such as obtaining a certificate or license.
4. they must have the marriage consummated by a judge in a record court or by a clergy of a recognized church.
5. they must be members of the opposite sex.
6. they must both consent.
7. they must have minimal mental capacity (know what they are getting into) AND
8. they must not be related.

If these requirements are not met, the marriage may either be VOID or VOIDABLE. The requirement at issue in this case is that they must not be married to someone else. In Missouri, a marriage by someone who is still married to another person is a bigamous marriage. Bigamous marriages are VOID, regardless of whether any party lacks knowledge of the marriage. This means anyone can challenge the marriage and it is treated as though it never existed. Therefore, because Danny was married, Cindy and Danny's marriage is VOID. Thus, an annulment will be granted.

However, because they were never married, maintenance will not be given. Under Missouri law, and the doctrine of necessities, each spouse owes a duty to support the other spouse. However, in order for the duty to arise, there must be an actual marriage. As discussed above, there would be no actual marriage and there could be no maintenance awarded. Simply cohabitating is not enough to require maintenance.

Therefore, although the marriage could be annulled, Cindy would not be awarded maintenance.

2. If the evidence was that Danny's first marriage was properly resolved, an annulment would not be granted. In order to grant an annulment, the court must find that the marriage was void or voidable. Assuming all of the other requirements for a valid marriage was met (since none of the facts indicate something else), and that no other grounds, such as fraudulent inducement into marriage, are met, the annulment would not be granted. The marriage is valid and would not be annulled.

3. If Danny's marriage was properly resolved, a legal separation would probably be granted.

A legal separation will be granted if:

1. one party requests it, and
2. the court determines the marriage is not irretrievably broken.

In this case, the first requirement would be met by Cindy filing for the legal separation. The issue, therefore, is whether the marriage is irretrievably broken. Cindy claims it is because Danny lied and deceived her. However, Danny claims he did not lie and he did tell her of his first marriage. Thus, a court would need to determine if this disagreement renders the marriage irretrievably broken. Because there is much dispute over the exact facts and because there is a lot of confusion, combined with the fact that Danny denies that it is irretrievably broken, it is likely that the court would not determine that the marriage was completely irretrievably broken and would therefore grant a legal separation.

4.

a. Missouri is a modified no-fault state. Thus, under Missouri law, in order to obtain a dissolution decree, it must be shown that a marriage is irretrievably broken either by fault or agreement of the parties (no fault).

If both parties agree that the marriage is irretrievably broken, the decree will be granted.

However, if one party disagrees, fault must be shown. The following are some causes that would

be considered "fault" for purposes of a dissolution decree:

1. adultery
2. unreasonable behavior (such that one could not reasonably be expected to have to live with the other)
3. abandonment for six months or more
4. consensual (agreed to) separation for one year or more
5. involuntary separation for two years or more.

In this case, the court would have to see if any of these actions were taken by Danny so that a dissolution decree would be granted. In any case, if Cindy moves out, she would be able to obtain a decree after two years since an involuntary separation for two years renders the marriage irretrievably broken.

b. Assuming a divorce decree is granted, Cindy's request for maintenance should not be granted unless she cannot meet her reasonable needs on her own. It should not be granted merely for "punishment for his deception." Under Missouri law, courts will look to many factors to determine if maintenance is proper. These factors include:

1. Financial resources of the parties
2. Employability
3. Duration of the marriage
4. Standard of Living of the Parties
5. Fault of any party.

The standard of living is usually only considered if the duration of the marriage is somewhat long.

In this case, if Cindy was not able to meet her reasonable needs, the court would look to the five factors to determine the amount of maintenance to be awarded. The facts do not discuss her employability or the financial resources and needs of the party. The duration was very short (around two years) and the standard of living during the marriage is not discussed. The court would also have to consider whether Danny really did lie to her to determine fault. However, because the facts indicate that Cindy wanted maintenance to punish Danny, it is unlikely that the

she was really in need of money in order to meet her reasonable needs and thus she will not be awarded maintenance.

07-04 Substitute for MEE 3, Example 2

1) Cindy is entitled to an annulment, but would not be entitled to maintenance

In order to have a valid marriage, the parties must have capacity to understand the nature of marriage, must consent (be 18 or be 15-18 with parental consent), must not be related to each other (siblings, descendants/ascendants, aunts, uncles, first cousins), must *be single*, must be of the opposite sex, and must receive a license and have a solemnized ceremony. If parties do not have capacity, do not consent because of duress, intoxication, age, etc., are not single, or are related to each other (first cousin or closer), the marriage is void and a party seeking annulment is entitled to it. The purpose of an annulment is to put the parties in a position as if they had never been married. In this case, because Donny was not single at the time he married Cindy, the marriage is void and the annulment should be granted. Note however, that there is a presumption that the first marriage was dissolved, and it was Cindy's burden to prove that Danny's first marriage was not dissolved.

Spousal maintenance can be granted upon *dissolution*, and requires that the court have jurisdiction over the parties' conduct. In this case, Cindy is seeking an annulment, not dissolution. Thus, a party is NOT entitled to maintenance, as the marriage is considered never to have taken place. Note however, that while maintenance will not be ordered, child support may still be ordered. However, even if the court would consider granting maintenance in the event of an annulment, it would not likely grant maintenance in this case, unless there are more facts to indicate maintenance is necessary. Namely, additional facts would be needed to indicate that Cindy is unable to meet her needs. Such facts would include things like she had little or no income, that Danny was able to pay, that the couple enjoyed a standard of living such that Cindy's income, alone, would not be sufficient to meet her needs, etc.

2) If the Danny's first marriage was properly dissolved, Cindy is not entitled to an annulment

As discussed above, in order to have a valid marriage, the parties must have capacity to understand the nature of marriage, must consent (be 18 or be 15-18 with parental consent), must not be related to each other (siblings, descendants/ascendants, aunts, uncles, first cousins), must be single, must be of the opposite sex, and must receive a license and have a solemnized ceremony. If parties do not have capacity, do not consent because of duress, intoxication, age,

etc., are not single, or are related to each other, the marriage is void and a party seeking annulment is entitled to it. Annulments are granted for those things that rendered the marriage void (bigamy, kinship, age, etc.) or for severe actions/conduct that would have changed the party's mind regarding marriage (e.g., venereal diseases, refusal to consummate the marriage). Things such as failing to disclose previous homosexuality or a previous sexual relationship are generally not enough to grant an annulment.

In this case, Cindy's only allegation is that Danny did not tell her that he had been previously married. Failure to disclose a previous marriage will not be sufficient grounds to grant an annulment.

3) A legal separation cannot properly be entered

In order to grant a legal separation, one of the parties must specifically ask for a legal separation and the court must find that the marriage is not irretrievably broken. In this case, there has been no formal request for a legal separation. In fact, Cindy has asked for either an annulment for a dissolution. Furthermore, based on the requirements for finding that a marriage is irretrievably broken (discussed below), it is unlikely the court would find that Cindy and Danny's relationship could continue. Thus, a legal separation would not be proper.

4a) The court must find that the marriage is irretrievably broken

In order to grant a dissolution, the court must find that the marriage is irretrievably broken. This can be either through the consent of both parties, in which case the court *must* grant the dissolution, or, if one party denies that the marriage is irretrievably broken, the petitioning party must show at least one of several factors. These factors include: 1) that the respondent spouse committed adultery and it would be unbearable to continue being married to the respondent spouse, 2) that the respondent's spouse's conduct is unbearable and the petitioning spouse cannot continue the relationship because of it, 3) that the respondent spouse has abandoned the petitioner for the last 6 months, 4) the petitioner spouse has abandoned the respondent spouse for 1 year or more, because of the respondent spouse's action, and 5) the parties have been separated for more than 2 years.

In this case, the facts do not indicate adultery, nor do they indicate that Danny and Cindy have lived apart during their marriage. Thus, the court must find that the marriage is irretrievably broken because of Danny's conduct. Arguably, Cindy's contention that Danny lies all of the time would be enough to establish that his conduct is unbearable, such that Cindy cannot continue to live with or be married to Danny.

4b) Cindy is not entitled to maintenance, unless she produces more facts indicating her inability to meet her own needs

Spousal maintenance can be granted upon dissolution, and requires that the court have jurisdiction over the parties. The purpose of spousal maintenance is to provide for a spouse who is unable to meet his or her own needs, based on his/her income alone. Maintenance can be permanent or it can be durational. Unless expressly stated as unmodifiable, maintenance can also be modified by the court. In determining if maintenance is appropriate, the court examines several factors, including 1) the financial position of the petitioning spouse, 2) the length of time it would take for the petitioning spouse to gain additional education or training, 3) the comparative earning capacities of the spouses, 4) the duration of the marriage, 5) the respondent's spouse's ability to pay, 6) the standard of living the couple enjoyed while married, and 7) the respondent spouse's conduct.

In this case, the facts provided do not indicate that maintenance would be appropriate. Cindy wants maintenance in order to "punish" Danny for his alleged deception. There is no indication that Cindy is unable to meet her own needs. While the respondent spouse's conduct is relevant, lying alone, without indication of financial inability would not be sufficient to award maintenance. If Cindy's income was such that she could not pay her bills or otherwise provide for herself, the court may still not award maintenance, if Danny is unable to pay, if it considers the 2 year duration of the marriage too short, if Cindy could get a better paying job if she wanted to, etc. Thus, Cindy's request for maintenance would be denied.

07-04 Substitute for MEE 3, Example 3

1. Assuming that Danny's first marriage was NOT properly dissolved, Cindy's request for annulment should be granted, and the request for maintenance should be denied.

Under Missouri family law, the requirements for a valid marriage include mental capacity; knowing and voluntary consent; unmarried parties; parties of opposite sexes; parties of sufficient age; licensure; and solemnization. A marriage where one party still is married to another person is void, and its validity can be challenged by any person at any time. Here, because Danny was still married to another person when he married Cindy, his marriage to Cindy was void from the outset and can be challenged by anyone.

Annulment is a legal process by which the marriage is declared invalid from the beginning, where it is void or voidable. The property division and maintenance analyses that generally accompany dissolution proceedings are not applicable to annulment proceedings, because the latter makes it as if the marriage never existed at all. In this case, Cindy will be able to obtain an annulment because the marriage is void.

Cindy will not be able to obtain a maintenance award, because a maintenance award only follows dissolution, and as the marriage will be treated as never having been in existence, no dissolution would be possible.

Therefore, the annulment will be granted, and the request for maintenance will be denied.

2. Assuming that Danny's first marriage WAS properly dissolved, Cindy's request for annulment should be denied. Annulment is limited to situations where the marriage is void or voidable. A void marriage may be annulled by the a challenge by anyone in any proceeding. A voidable marriage may be annulled only by one of the parties to the marriage. However, assuming Danny was not already married to someone else when he married Cindy, there are no facts to suggest that this marriage is void or voidable. Therefore, the annulment request will be denied.

3. Assuming that Danny's first marriage WAS properly dissolved, an order of legal separation cannot be entered unless it was requested by one of the parties.

Legal separation is a remedy that is available where the court finds that the marriage is not irretrievably broken and where one of the parties seeks a legal separation in the pleadings. The court cannot grant a legal separation simply because it finds lack of irretrievable breakdown (a requirement for dissolution in Missouri). In this case, there are no facts to suggest that either party has requested the remedy of legal separation. Cindy has requested dissolution, and Danny objects to any change in their marital status. Therefore, the court cannot enter an order of legal separation under these facts.

4.a. If Cindy decides she would rather get a decree of dissolution and Danny denies that the marriage is irretrievably broken, the court must find that the marriage is irretrievably broken based on a list of pseudo-fault-based factors in order to grant Cindy's request for a decree of dissolution.

Under Missouri family law, where both parties to a dissolution proceeding agree that a marriage is irretrievably broken, the dissolution will be granted. However, where only one party claims that the marriage is irretrievably broken, the court will not grant a dissolution unless it finds the marriage irretrievably broken based on any of the following factors: Respondent has committed adultery; Respondent has behaved in a way that makes continuation of the marriage infeasible (*e.g.*, through cruelty, battery, other abuse); Respondent has abandoned Petitioner; the parties have voluntarily separated for at least one year; or the parties have involuntarily separated (one left and has remained out of the home) for at least 2 years.

In this case, Danny is the respondent, and Cindy is the petitioner. The facts do not suggest that Danny has behaved in a way that would lead the court to grant a dissolution based on the fault-oriented factors. The allegations of lying in this case are irrelevant to these factors. Further, the facts do not suggest that Cindy and Danny have been separated, voluntarily or involuntarily, for any period of time.

Therefore, in order to grant Cindy's request for a decree of dissolution, the court would have to find that Danny engaged in adultery or cruelty that caused the marriage to be irretrievably broken, or that Danny and Cindy had been separated for the requisite periods of time.

4.b. Assuming that a dissolution is granted, Cindy's request for maintenance should be denied.

Under Missouri family law, maintenance is available only where the obligee (recipient) is unable to meet his/her reasonable needs. Maintenance may be permanent (also known as alimony) where the marriage was of very long duration and the obligee is not likely ever to be able to meet his/her reasonable needs. However, in the vast majority of cases, maintenance is durational and is ordered only for that period of time until which the obligee will be able to meet reasonable needs. The obligee has an ongoing duty to become self-supporting.

The factors to be considered in an award of maintenance include:

- (i) economic resources of the parties (*i.e.*, separate property and share of marital property to be received),
- (ii) employability (educational level, work experience, time out of the workforce)
- (iii) child custody arrangements, if any
- (iv) standard of living during the marriage (but only if the marriage was of very long duration);
and
- (v) duration of the marriage.

In this case, the marriage was of short duration, such that standard of living will be irrelevant, and we have no facts regarding child custody arrangements or any factors that would prevent Cindy from being fully employable. The only explanation on the facts for Cindy's maintenance request is that she wants to punish Danny, which is not a relevant or acceptable consideration.

Accordingly, maintenance should not be ordered.

07-04 MEE 4 Example 1

Son-in-Law

Son in law will not share in Decedent's estate, but will take Clara's estate under Clara's will. Missouri has a Simultaneous Death Act, which provides that if there is no sufficient evidence that two persons died other than simultaneously, each decedent is treating as having predeceased the other. In other words, for purposes of intestate succession, the otherwise intestate heir that died simultaneously with the decedent will be treated as predeceasing the decedent for purposes of intestate distribution, and vice versa. In this case, the emergency medical team found both Clara and Decedent dead at the scene. The fact that the emergency room physician actually declared one dead before the other seems to be irrelevant, at least in the sense that this is not otherwise sufficient evidence that Clara and Decedent did not die simultaneously. Therefore, under the Simultaneous Death Act, Clara would be treated as having predeceased her father for purposes of intestate succession, and the part of his estate that would have otherwise passed to her as his only issue (all of it), will not pass to her estate. As a result, it will also not pass to her husband, Son-in-Law, even though he is the sole beneficiary of her will.

Even assuming that the fact that the emergency room physician's pronouncement of the time of death of Clara and Decedent constitutes otherwise sufficient evidence to show that the two did not die simultaneously, Missouri law will still operate to prevent any of Decedent's estate from passing to Clara, and thus, to Son-in-Law, under her will. Missouri has a 120 Hour Statute, which provides that a person who would otherwise take by will or intestacy must survive the decedent or testator by 120 hours in order to take. If they do not survive by 120 hours, they will be treated as having predeceased the testator, and will not take under the will or intestate succession. In this case, there is no evidence that Clara survived Decedent by 120 hours. Therefore, the result is the same, whether under the Simultaneous Death Act or the 120 Hour Statute in Missouri.

Gramps

Gramps will not be entitled to share in Decedent's estate. If a decedent dies intestate, and there is no surviving spouse or issue, the parents and siblings each take in equal shares. In this case, because Decedent has surviving siblings, they will take before Gramps will take. Therefore, Gramps is not entitled to receive a distribution under the will.

Brother, Half-Sister and Adopted Sister

Because Gramps does not take an intestate share, Brother, Half-Sister and Adopted Sister will share in the intestate estate, using the per capita with representation intestate distribution scheme. However, three primary issues will still affect the determination of the distributions as among Brother, Half-Sister, and Adopted Sister: (1) whether the \$90,000 given to brother to purchase a home is considered an advancement; (2) the share that half siblings take under intestate succession; and (3) whether Adopted Sister's status as an adopted child will affect her intestate share.

First, under Missouri law, an inter vivos transfer is *not presumed* to be an advancement that will fall into hotchpot and be counted against an intestate share unless the intent to do so is clear through: (1) a contemporaneous writing by the decedent stating that it is to be treated as an advancement; or (2) the writing by the donee stating that it is an advancement. In this case, neither Decedent or Brother executed writings indicating that the \$90,000 cash transfer from Decedent to Brother was intended to be an advancement against Brother's intestate share. Therefore, because it is not presumed to be an advancement, and there is no writing evidencing a contrary intention, the \$90,000 will not be counted against brother's share.

Secondly, under Missouri law, half "blood" siblings take a half intestate share as compared to "full blood" siblings. Therefore, in determining the distribution of Decedent's estate, Half Sister will only take a half share.

Finally, under Missouri law, adoption results in a rebirth. When a child is adopted, the child loses all legal rights to inherit from their natural parents, but acquires a new set of legal rights, including the right to inherit, from their adoptive parents. Therefore, in this case, Adopted Sister's adopted status will not have any effect on her intestate share.

As a result, the distribution of Decedent's estate will be as follows:

Brother: $\frac{2}{5}$ or \$120,000

Adopted Sister: $\frac{2}{5}$ or \$120,000

Hlaf-Sister: $\frac{1}{5}$ or \$60,000

07-04 MEE 4 Example 2

When one dies without a will, that person is deemed to have died intestate. His or her estate will pass by intestacy to his spouse, heirs, or descendants. Missouri's approach to intestate succession is per capita by representation.

(a) Son-in-Law

The issue here is whether Clara may be considered to have outlived decedent and therefore whether she takes under his decedent's estate. If she takes, because her husband Son-in-Law was the sole beneficiary of her estate, he will take Decedent's entire estate.

In Missouri, in order to take an intestate share, one must outlive or survive the decedent by 120 hours under the 120 hour rule. If the beneficiary does not outlive the decedent by 120 hours, then the beneficiary's share lapses. If there is no evidence as to whether a beneficiary survived the decedent, Missouri will apply the Simeltaenous Death Act. Under this rule, the beneficairy will be treated as if he or she predeceased the testator, and his or her share of the estate would then lapse. Here however, it is clear by the facts that Clara did not outlive Decedent by 120 hours. She may have survived him by mere moments because he was in the back seat during the car accident, but the facts indicate that emergency medical team found neither alive. As such, Clara will be treated as having predeceased Decedent and her share will lapse. Missouri has an anti-lapse statute that applies when a beneficiary who is a relative of the decedent predeceases the decedent, she will be substituted by her issue. Here, while Clara is a relative (daughhter) of Decedent, she has no issue so the antilapse statute will not apply to save her share of the estate. As such, her share will revert to Decedent's estate and Son-in-Law will receive nothing.

(b) Brother

Brother will receive 2/5 of Decedent's estate. The order of intestate succession in Missouri is (1) spouse (2) issue (3) brother, sisters, parents, (4) grandparents, aunts, uncles. There is no distribution beyond the 9th degree of separation. Here, Brother is Decedent's sibling, so he will

receive a $\frac{2}{5}$ share. This $\frac{2}{5}$ share amounts to \$120,000 from Decedent's estate. However, it is possible that the \$90,000 Decedent loaned to Brother would be considered an advance on his gift in Decedent's will. Such gifts are not presumed to be an advance, but an advance can be shown by either be in writing or acknowledged as an advance by the beneficiary who received the advance. Here, neither is present so Brother will likely receive the $\frac{2}{5}$ share or \$120,000. He will share the estate (in unequal proportions) with Half sister and adopted sister, as will be explained below.

(c) Adopted Sister

Here the facts state that Decedent's parents adopted Adopted Sister. In Missouri, adopted children are treated the same as natural children and are accorded the same rights as natural children. As such, because Adopted Sister will be treated as if she were Decedent's natural sister, she will receive the same share as Brother, $\frac{2}{5}$ of Decedent's estate, or \$120,000.

(d) Half-sister

In Missouri, full blood siblings will get twice the intestate share as any half blood siblings. Here, the facts state that Decedent's mother had a child with a man who was not Decedent's father. As such, the resulting child, Half Blood, is a half blood who is entitled to receive half of the amount of Decedent's estate as Brother and adopted sister, i.e. $\frac{1}{5}$ of the estate. She will thus receive \$60,000 under Decedent's estate.

(e) Gramps

Gramps will receive no share of Decedent's estate. As stated above and pursuant to Missouri's rules regarding intestate distribution, because Decedent had siblings surviving him, they will take the entirety of his estate leaving Gramps with no share in Decedent's estate.

07-04 MEE 4 Example 3

1) Did Clara survive Decedent?

Under MO law, one must survive a decedent by 120 hours (5 days) to be considered a survivor. It is irrelevant who is pronounced dead first, and those who survive a decedent by less than 120 hours are treated as predeceasing that person. Here, Clara and Decedent were in the same accident, and the emergency personnel found no evidence that either of them was alive at the scene. The physician examined them and found them both to be dead, presumably within the same 24 hour period. Therefore, Clara did not survive Decedent and will not take as an heir.

2) Who takes? Intestate succession in MO

MO generally follows the per capita with representation approach to intestacy, with a few special rules to apply. Since Decedent had no surviving descendants and no surviving spouse, the first level of relatives that are eligible to take are siblings and parents in equal shares. Here Decedent's parents predeceased him, and he has two sisters and a brother. Grandpa would be next in line absent Decedent's siblings, and Son-in-Law gets nothing.

3) rule re: half siblings & adoption

Half siblings are only allowed to take one half of the share that full siblings get under intestacy, so here Half-Sister will get one half of what Brother gets. Adopted children are treated equally under the law as biological children, so Adopted Sister will be treated just like Brother.

3) Was the check to Brother an advancement?

An advancement is chargeable against the share the donee would take under intestacy. An inter vivos gift is presumed NOT to be an advancement, unless it is stated in writing to be such by the donor or acknowledged in writing as an advancement by the donee. Here there is no evidence that the check to Brother was meant to be an advancement, so the general presumption

applies and the \$90,000 is NOT an advancement and does not reduce his intestacy share.

5) Value of shares

As described above, Brother, Adopted Sister (AS), and Half Sister (HS) will take under intestacy. Brother and AS receive equal shares, and HS only gets one half of that amount. Therefore, Brother and AS each get $\frac{2}{5}$ (40% of \$300k = \$120k), and HS gets $\frac{1}{5}$ (20% of \$300k = \$60k).

07-04 MEE 5 Example 1

SUB-PART ONE

In issue is whether Owen, an emergency room physician, is an "employee" or an "independent contractor" for purposes of agency law. This determination requires a balancing of a number of factors. In this case, there are factors going both directions, but ultimately, Owen is probably an employee of Best Care Hospital.

Courts generally consider the issue of control to be the most significant overall factor in determining the nature of the employment relationship. This idea of control consists of several sub-factors, including control over services provided, supplies used, and general quality of performance. Here, the facts clearly indicate that Best Care exercised substantial control over its doctors.

Although the doctors are "authorized" to purchase supplies without consent, they are limited to approved vendors and price guidelines. Moreover, this indicates that "authority" is needed. The doctors are permitted to have their own practices, but cannot work in other emergency rooms. They bill their patients individually, but services must be performed at Best Care's ER with Best Care's equipment and supplies. Finally, the doctors are subject to periodic performance review by the Hospital.

One other factor supporting a finding that Owen is an employee is the term of relationship. Generally, independent contractors are retained for a specific service or project. On the other hand, employees are retained for indefinite tenures to perform a range of continuous services. Here, the doctors appear to be employed for an indefinite term.

Although the contracts claim independent contractor status, such express claims are not controlling. If the evidence suggests an employment relationship, the particular title used is irrelevant.

SUB-PART TWO

In an agency-type relationship, a principal will be liable on the contracts of its agents if there is authority, which may be either: (1) actual authority, (2) apparent authority, or (3) ratification authority. On the facts provided, no authority of any kind existed in relation to Owen's dealings with Vision.

Actual authority (express or implied) focuses on communications between the principal and agent. In this case, Owen was well aware that he exceeded the bounds of his express authority when he purchased the X-Ray machine from a non-approved vendor, regardless of the price guidelines. Further, there is no implied actual authority because there is no reason to think that his purchase was an implied extension of his express authority, given specific contractual instructions to the contrary.

Apparent authority focuses on communications between the principal and the third-party. Note that it does not consider communications between the agent and the third party. Apparent authority is premised on the idea that a principal may hold out to a customer/client that the agent is authorized to act. This is strengthened if the third party then reasonably relies on the statement of authority and is harmed. Here, although Owen (the agent) implied to Vision that he was acting on behalf of Best Care, there is no evidence that Vision received any such indication of authority from Best Care (the principal). In fact, "Vision has had no previous dealings with Owen or Best Care." Therefore, there is no apparent authority.

Finally, ratification authority exists where the principal -- after the fact -- either ratifies or accepts the benefits of the actions by the agent. There is no such evidence here. Best Care refused delivery of the X-Ray machine outright. There is no authority, and Best Care cannot be held liable to Vision for breach of contract or be held to Owen's unauthorized contract.

SUB-PART THREE

We are told to assume that Owen is an independent contractor, and not an employee of Best Care. Where this is the case, we cannot rely on the rule of vicarious liability for the non-intentional torts of employees within the scope of employment. If Best Care will be liable to Anita, it will have to be on an agency theory.

In this case, however, Best Care may be held liable for Owen's actions. Best Care extensively advertises and places strategic billboards extolling the services and care of "its doctors." They refer to them as "Best Care's emergency room doctors." This gives Anita a very strong argument that Best Care, the principal, is holding out its doctors as authorized agents to provide hospital services on the hospital's behalf. Moreover, we know from her comments in the ambulance that she went to Best Care for its ER doctors in reasonable reliance on its advertisements (which she directly quotes). The combined facts that (1) Best Care cloaked its doctors in the guise of authorized agents, and (2) Anita reasonably relied on these representations, Best Care will be held liable on a theory of apparent authority.

07-04 MEE 5 Example 2

1. The facts indicate that Owen is most likely an independent contractor of Best Care. In order for someone to be classified as an independent contractor or an employee, the court has to look at the degree of control that can be exercised by the employer. Also, the court must consider factors such as: the occupation, the skill involved, who provides the tools, how the person is paid, who does the scheduling, how complex the function to be performed is, and other factors which would show that the employer has the right to control the actions of the person. The parties often label the relationship as independent contractor or employee, but that label is not controlling. It is a question of fact for the jury. Here, the doctors (Owen) are labeled as independent contractors. Weighing in favor of that status are the facts that being an ER physician is a job requiring a great amount of skill, it is complex and requires a professional license and education. Owen also bills for his own services and purchases his own supplies (albeit they are paid for by Best Care and from approved sellers). Weighing against his being an independent contractor is the fact that he works out of space provided by Best Care, the tools he uses are supplied and paid for by Best Care, Best Care has the right to review the services he provides. Also in favor of independent contractor status are the facts that he supplies his own malpractice insurance and can practice on his own, just not in another ER. On these facts only, Owen is an independent contractor, not an employee.

2. Best Care is liable on the contract w/Vision. At issue is whether Owen had the ability to enter into the K with Vision on behalf of Best Care. There are many ways in which Owen could have this authority. They are express, inherent, apparent, or Best Care could ratify the K. Express authority flows from an express statement of authority given by the principal to the agent. Inherent authority flows from express authority and it usually comes out of the details of the express authority. When there is some representation by the principal of the authority of the agent to a third party, apparent agency exists. Here, Best Care gave Owen express authority to order medical supplies, but only from a list provided by Best Care which lists vendors and price guidelines. Vision was not on this list, even though the price was acceptable. Owen acted beyond his express authority and any inherent authority. There was no representation from Best Care to Vision of Owen's agency for apparent authority. Therefore, Best Care can only be liable on an agency by estoppel theory, where the 3rd party relies on the representation of the agent and it would be unfair not to hold the principal liable on the K. Here, Owen made representations that he was on behalf of Best Care. Vision relied on these representations, and the goods were specially manufactured, so Best Care should be held liable.

3. Best Care is liable for Owen's malpractice. Best Care cannot delegate an inherently dangerous activity or a non-delegable duty to an independent contractor to avoid liability for that contractor's negligence. Emergency room services have been held to be non-delegable duties. Also, anytime someone is put under anesthesia, there is a risk of death.

Though it's a weak argument, this could be another reason to hold Best Care liable. The best reason, though, is by apparent agency. As discussed above, this is where the principal makes a representation of agency to a 3rd party. Here, the billboards placed by Best Care created the opinion in Anita that it had the best ER doctors and that those doctors were agents of Best Care. Therefore, because of Best Care's representation of Owen's agency, it will be held liable for his malpractice.

07-04 MEE 5 Example 3

Whether Owen is or is not an independent contractor is a close call but it is probably more likely that a court would find Owen is an independent contractor. In determining whether a party is an independent contractor or an employee, courts will look at a number of factors including the amount of control the employer has over the person, whether the person is paid by the job or on an hourly or salary basis, who provides the tools, whether the person is a professional. Here, the fact that Best Care provides all of the supplies and equipment and the fact that each doctor is periodically reviewed tend to lead toward a finding of Owen being an employee because Best Care is utilizing some form of control over him. However, the fact that Owen is a doctor and as such a professional, who bills clients independently of Best Care and is responsible for the manner in which he provides medical care as well as the fact that he must provide for his own malpractice insurance, seem to tip the scale more in favor of his being an independent contractor. These factors go to show that Owen is really in control of how he provides the care, that the patients not Best Care are paying him and he has a duty to individually bear the risk of malpractice.

As such it is more likely the court will find Owen an independent contractor.

It is doubtful that Best Care will be liable for breach of contract. In order for a principle to be bound by the acts or omissions of its agent, the agent must first have the authority to bind the principle. This authority to bind the principle can come in the form of actual authority (where principle communicates authority to agent) or apparent authority (where principle holds out someone as its agent to a third party who relies on that statement). In the facts here, there is nothing to indicate that apparent authority existed sufficient to bind Best Care to the contract with Vision. Although Best Care advertised throughout City, it was not doing so in such a way to inform medical equipment manufacturers 450 miles away that Best Care's Doctors had authority to enter in to contracts which would bind Best Care.

A better but most likely still weak argument could be made that Owen was acting under express authority sufficient to bind Best Care to contracts with Vision. In fact Owen did have express authority to purchase supplies and equipment for Best Care, but only from an approved list of vendors within City and then only if it was within Best Care's price guidelines. Here Owen did purchase equipment for Best Care's emergency room that was within the price guideline but he did not purchase it from an approved vendor within the state. Therefore Owen was not acting under actual or express authority.

It could be argued that Owen was acting under implied authority when he purchased the equipment but that argument would only apply if the contract did not expressly state who he could or could not purchase from. Implied authority is a way for a court to hold a principle liable for doing something not expressly covered in the

agreement but that could reasonably be interpreted from the agents actual authority. Since Owens overstepped his actual authority this argument will fail. But if it didn't, Best Care could seek damages against Owen for breaching his duty of obedience.

Even if Owen is an independent contractor Best Care is probably liable for Owen's negligence. Here Best Care would be liable because Owen was acting under apparent authority. Apparent authority exists when a principle holds out someone as their agent and a third party relies on it. By advertising that Best Care's doctors are the best, a court would likely construe this as holding the doctors out as Best Care's agents to perform medical procedures on behalf on Best Care. The facts even go so far as to indicate Anita said she wanted to go to Best Care because its doctors are the best indicating reliance on Best Cares holding out of its doctors as its agents. As such apparent authority exists and Best Care should be liable for Owens' negligence. However because Owen arguably violated his duties of skill and care, he may be liable to Best Care for breaching those duties through his negligence.

07-04 MEE 6 Example 1

1. Yes, the federal court erred in denying Executor's motion to dismiss for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction. Jurisdiction is proper in federal courts if there is a claim arising under federal law or if there is complete diversity. There is no federal claim in this case. Complete diversity requires that no plaintiff and no defendant have the same domicile and the amount in controversy is more than \$75,000. The amount in controversy is reviewed at the time of the pleadings and not the amount of the jury verdict, so there is an amount greater than \$75,000 as Plaintiff prayed for \$500,000. In this case both Plaintiff and Tortfeasor have the same domicile (State X), but Executor is a domicile of State Y. When a plaintiff is suing a decedent, the domicile is that of the decedent and not of his executor. Therefore, even though the amount in controversy is sufficient, the parties are not diverse and therefore, complete diversity does not exist.

The judge also improperly stated that the motion to dismiss was untimely. A motion to dismiss based on subject matter defect is not waived by not raising the defense in the pleadings, even if Executor admitted it. Admissions are binding on a party when a party specifically admits an item in a request for admissions. However, during trial an admission in the pleadings can be used as evidence. Subject matter defect is a jurisdictional defect that can be raised before trial. Therefore, Executor did not file the motion untimely.

2. Yes, State X should enforce the federal judgment. According to the Constitution, jurisdictions are required to give full faith and credit to decisions of sister states. The recognizing state has to give full faith and credit to the decision in the rendering state if jurisdiction was proper, the decision was final, and on the merits. In this case jurisdiction was not proper. However, a decision will still be given full faith and credit if the issue of jurisdiction was heard and decided. In this case, the parties submitted briefs and had oral argument regarding the validity of jurisdiction. The court specifically found that there was jurisdiction, even the court also held that the motion was untimely. Based on this, the proper route for Executor was to appeal the decision on the final judgment on the basis of jurisdiction. Executor did not appeal, therefore, the decision of the federal court is final. It was on the merits as there was a jury trial and the jurisdiction issue

was heard by the judge. Therefore, according to the Constitution the court must give it full faith and credit.

07-04 MEE 6 Example 2

1.

The federal court of State Y did err in denying Executor's motion to dismiss.

Federal courts are courts of limited jurisdiction. Jurisdiction only arises if there is a federal question or diversity is satisfied. Diversity jurisdiction requires every plaintiff to be a citizen of a different state than every defendant. Additionally, the amount in controversy must exceed \$75,000.

In this case, neither federal question or supplemental jurisdiction (federal jurisdiction over a state claim based on the fact that the federal court has jurisdiction over a claim that shares a nexus of operative fact with the state claim) apply. At issue is the existence of diversity jurisdiction. When determining citizenship, a person is normally the citizen in the state in which he is domiciled (presence plus intent to remain). However, an executor who is sued in his representative capacity has the citizenship of the decedent attributed to him. Here, Executor's citizenship for purposes of this suit was State X. Because Plaintiff is also a citizen of State X, there is no diversity of citizenship.

Therefore, the court did not have jurisdiction and the district court's finding otherwise is wrong.

The finding that the motion was untimely is also in error. A failure of jurisdiction prohibits the federal court from hearing the case. Under the Federal Rules of Civil Procedure, a motion to dismiss for lack of subject matter jurisdiction is not waived if it is not filed first (unlike other "disfavored" motions). The motion can even be raised on appeal. And unlike in a removal action in which proceeding in state court for a year can bar an otherwise permissible removal to federal court, the federal judiciary is barred from hearing cases over which it lacks jurisdiction. This prevents any rule like the removal from barring the dismissal because it is too late in the trial.

Therefore, the court erred when it considered the motion untimely.

2.

State X should probably enforce the judgment. At issue is the effect of Executor's failure to appeal the erroneous ruling by the federal court.

Normally, a state need only give "full faith and credit" to decisions rendered by a court of (i) competent jurisdiction, (ii) that have judged the claim on the merits, and (iii) finally decided the matter. Applying the general rule, State X need not enforce the federal court judgment because the federal court lacked jurisdiction to decide the case.

However, the issue of subject matter jurisdiction should have been raised by Executor on appeal. By failing to appeal, Executor has waived any defense to the enforcement of the judgment in State X. The federal court judgment is final because of the failure to timely appeal, and it was on the merits. Therefore, State X should recognize the federal court's judgment and enforce.

07-04 MEE 6 Example 3

1. Jurisdiction is improper in federal court of state Y

Federal courts are courts of limited jurisdiction. To file a claim in federal court one must either have (1) a question arising under federal law or (2) meet the requirements for diversity jurisdiction.

In this case there is no federal question involved and so the case must meet the requirements for diversity jurisdiction. To file a case under diversity jurisdiction there must be complete diversity between all of the plaintiffs and all of the defendants and the plaintiff's well-pleaded complaint must in good faith allege damages in excess of \$75,000.

In this case plaintiff's damages were apparently in good faith and, at \$500,000, were well over the minimum amount. In terms of diversity, however, Plaintiff and Tortfeasor themselves were from the same state (X), while Executor is from state Y. Since Plaintiff is suing Tortfeasor's estate, which is the same as suing Tortfeasor himself, there is not diversity between the parties.

Therefore the subject matter jurisdiction for this case is improper, and the court erred in refusing to dismiss on these grounds.

Jurisdiction can always be raised

Even though Executor waited one year before raising the issue of jurisdiction with the court, this should not prevent Executor from prevailing on this point. In federal court, jurisdiction can be raised at any level of review and at any point in the proceeding, and thus Executor's delay of one year should not prevent the court from dismissing the case for this reason.

Thus for this additional reason the court improperly denied Executor's motion to dismiss.

2. The State X court should enforce the judgment from State Y

A valid judgment from one US state will be entitled to full faith and credit if that judgment is (1) final and (2) on the merits and (3) if the case was fully and fairly litigated by the parties.

In this case, while Executor moved to dismiss the case for lack of subject matter jurisdiction, after this was denied Executor went on to fully and fairly litigate the case to his utmost ability.

Therefore the judgment from the federal court in state Y was apparently decided on the merits.

Finally, the judgment is final because the trial court entered judgment on the jury's verdict and neither party appealed the judgment.

Therefore, given that the judgment of the federal court in State Y was fully and fairly litigated and that the judgment was on the merits and final means that it is entitled to full faith and credit from the State X courts.

In addition, if Executor wants to fight the judgment based on lack of subject matter jurisdiction, the proper route for doing so is by filing an appeal within the appropriate US Court of Appeals for the State Y district. He cannot do so by fighting the judgment in State X.

07-04 MEE 7 Example 1

I would find that Buyer owes Finance Co. 50,000 dollars for the payments it made to Seller after it was informed that Buyer should pay Finance Co.

Under Missouri Secured Transactions law a person with a security interest in chattel paper and accounts receivable can request the party that is obligated to pay under the accounts receivable or chattel paper to pay secured party that is collecting on a security interest against the holder of the accounts receivable and chattel paper. But the holder of the security interest only has the same rights the debtor has and is subject to the same defenses the debtor is. Under Missouri Sales Law, a buyer can reduce payment to seller when the seller's goods are nonconforming.

In this case, Finance Co. informed Buyer that Buyer should now pay Finance Co. what it owed to Seller because Finance Co. was now collecting on the its collateral (chattel paper and accounts receivable). Therefore, Buyer is liable to Finance Co. for the two payments it made to Seller after it had notice from Finance Co. The Buyer can try to recover these two payments from Seller and will likely be successful if the Seller is not insolvent. Additionally, the secured party only gets the rights of the debtor. The debtor is subject to defenses of non-compliance with a contract. In this case Seller did not fully perform its obligation under the contract and therefore Buyer reduced the payment paid by not paying its last payment. Therefore, Seller is not entitled to last payment and therefore Finance Co. is not entitled to last payment. Seller is also liable to Buyer on the contract for 5,000 dollars more arguably because it cost buyer 30,000 dollars to make the same improvements that were under contract for 25,000 dollars. Arguably this 5,000 dollars could not offset anything that it owed to Seller because Buyer paid 50,000 dollars in payments to Seller and Seller is obligated to Finance Co. for any payments made on those accounts (Note: that I would normally look up to see whether this 5,000 dollar difference could be offset with what is owed to Finance Co.).

Therefore, I would find that Buyer owes Finance Co. 50,000 dollars for the two payments it made to Seller after it was informed that Buyer should pay Finance Co. Although if the 5,000

dollar offset was allowed like stated above then the Buyer would owe Finance Co. 45,000 dollars.

07-04 MEE 7 Example 2

Buyer (B) owes Finance Co. (F) \$50,000, the payments for March & April, but not the payment from May. This question involves both Article 2 UCC for sale of goods & Article 9 UCC for secured transactions.

Under Article 9, F had a properly perfected security interest in all of Seller's (S) accounts receivable, including B's account. Once S went into default, F was entitled to collect on those accounts receivable. It doesn't matter that F chose to do that instead of immediately demanding full payment from S. Once F properly notified B of its right to receive payment through its security interest, B was required to start sending its payments directly to F. S had no right to tell B to disregard F's directions & B should not have done so. So B wrongly sent its March & April payments to S when they should have been sent to F. Because B had notice that it should send to F, it does not get any credit for the payments it sent to S & still owes F the full \$50,000. B may then seek a refund of its earlier payments to S from S. But, B does not owe F anything for May. B & S had an agreement to provide a certain type of excavator & S breached the agreement because it did not make perfect tender - the goods did not exactly comply since there were no attachments. Under Article 2, B then had the option of rejecting the goods or accepting it & then suing for damages. B chose to accept the defective excavator, but informed S that it would deduct from final payment the cost to make the excavator comply with the contract. It doesn't matter that S told B that it expected full payment. S breached its contract by not providing the correct goods. B is entitled to damages under Article 2 of either the cost to make cover - here, make the goods compliant - or the difference in value between the goods as promised & the goods as delivered. That amount of damages can be offset against any amount B still owes under the contract. B isn't released from any further obligation under the contract because B kept the excavator. But B's damages exceed the amount still owed on the contract, so B owes S nothing & in fact may get \$5,000. F is an assignee of S. An assignee is subject to the same defenses as the assignor. So F is subject to B's defense that S did not provide conforming goods & so B can offset its damages against the amount still owed. Because S would not be able to collect that remaining \$25,000, F cannot collect it either.

07-04 MEE 7 Example 3

Buyer owes Finance Co. \$45,000. The first issue is whether Finance Co. can recover the \$75,000 remaining on the contract from Buyer. Finance Co. can recover these payments. Finance Co. had a valid security interest in Seller's accounts receivable and chattel paper. This security interest had attached (attaches when 1) Secured party gives value, 2) There is an agreement creating a security interest and 3) The debtor has rights in the collateral). Thus, Finance Co. has a valid security interest that was properly perfected. Finance Co. then properly notified Buyer that all payments should be sent to Finance Co. At this point, Buyer had notice of the assignment, and was required to send all payments to Finance Co. The fact that Seller told Buyer to disregard this instruction is irrelevant since Seller no longer had the right to receive those payments and Buyer was on notice. After receiving this notice, any payments Buyer made to Seller were made at its own risk. Thus, Buyer wrongfully paid the March and April installments to Seller when they should have been made to Finance Co. Buyer owes the \$75,000 remaining on the contract to Finance Co. Paying Seller did not discharge its duty to pay.

The second issue is whether Buyer has a right to setoff against these payments for the amount it spent bringing the excavator up to contract specifications. This was a sale of goods governed by the UCC. The UCC requires perfect tender. Seller failed to make perfect tender of the excavator on April 5 because the excavator did not meet contract specifications. Failure of perfect tender is a breach of the contract. In a sale between two merchants, the buyer has the choice of rejecting the goods, accepting the goods in full satisfaction, or accepting the goods and then seeking damages for cover. In this case, Buyer was fully within its rights by accepting the excavator and then covering by bringing the goods up to contract specifications. Buyer also could offset this amount against the contract price. It makes no difference that Seller said it expected to receive the full contract price - Seller breached the contract. Thus, Buyer has a defense of setoff against Seller. When Finance Co. took over Seller's accounts receivable, it stepped into Seller's shoes. Thus, Buyer's right of setoff is also good against Finance Co. Buyer owes Finance Co. \$75,000 and has a right of setoff for \$30,000, meaning it owes Finance Co. \$45,000.